IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 25

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD B. CALDERON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NORMAN HERRING
1111 East Broadway
Tucson 11, Arizona
Counsel for Respondent

JOSEPH W. BURNS
30 Rockefeller Plaza
New York 20, New York
Of Counsel

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UNITED STATES OF AMERICA, *Petitioner.* *vs.* EDWARD B. CALDERON, *Respondent.*	No. 577

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953 (R. 220). A petition for rehearing was denied on December 8, 1953 (R. 220). The petition was served on respondent on February 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., 1254.

QUESTIONS PRESENTED

1. Where an income tax evasion prosecution is based upon an increase in net worth, is this circumstantial evidence which must exclude every reasonable hypothesis other than that it was derived from current taxable income?

2. In an income tax evasion prosecution, is the Government required to prove some portion of the corpus delicti

by independent evidence before the defendant's extra-judicial admissions may be introduced as evidence against him?

3. In an income tax evasion prosecution based on proof of unexplained increases in net worth, must the Government prove each pertinent item of the net worth statement at the starting point to a reasonable certainty?

STATUTE INVOLVED

Internal Revenue Code:

Sec. 145 (b):

> ". . . any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisonment for not more than five years, or both, together with the costs of prosecution." (26 U. S. C. 1946 ed., Sec. 145)

STATEMENT

Respondent was charged with wilfully attempting to evade his own and his wife's joint income tax liabilities for the years 1946, 1947, 1948, and 1949, in violation of Section 145(b) of the Internal Revenue Code (R. 3-6). He was an operator of a small legitimate coin-machine business in Douglas, Arizona (R. 156-157, 180). He had a meager education, having gone two months to high school, and had started in business with two machines (R. 153, 154). Being unfamiliar with books and records,

he obtained the services of his brother's boss, Mr. Speer, an elderly man who operated a confectionery store. Speer told respondent to get some sales books, and then proceeded to keep books for the respondent in a complete, but rather primitive way, from about 1936 to about 1943 (R. 133, 134, 157, 158). During that period, Speer made out respondent's income tax returns (R. 158).

In 1943, Speer's health failed, and respondent obtained the services of a friend, Eugene C. Verdugo, on a part-time basis to keep the books and prepare the income tax returns (R. 134, 158, 159). Verdugo, whose occupation was manager of a lumber company, did this work as a favor to respondent (R. 127, 134). He prepared the tax returns from 1943 to 1950 inclusive (R. 128-129). During the course of the investigation by the Internal Revenue agents, Verdugo and respondent cooperated with them, and turned over all of respondent's books and records (R. 87, 140). Verdugo told the agents that in his own mind he was sure that respondent never intended to defraud anybody (R. 141).

The Government offered no direct evidence of any income received by respondent and not reported on his income tax returns. It did not offer in evidence the books and records of respondent, upon which the returns were based (R. 129), and did not contend that they were inadequate. It based its case solely on the contention that there was an increase in the visible net worth of respondent each year in excess of the reported income (Br. 3).

At the trial the following stipulation was entered into (R. 8-9):

> "It is hereby stipulated that with reference to the assets and liabilities of the defendant as of December

> 31 of each of the years 1945 to 1949, inclusive, with the exception of the items of assets designated as 'cash on hand' and 'cash in bank' that the Government witness, Special Agent Lloyd M. Tucker, may testify from his reports as to the total of the items going to make up said assets and liabilities without producing any supporting documents or records. It is further stipulated as to items of 'disbursements' and 'expenditures' made by the defendant during the years enumerated which are claimed by the Government to be non-deductible, the said witness may testify as to the total of such items for the years above enumerated without producing any supporting records."

The Government offered no independent evidence of the item "cash on hand", but relied solely upon alleged verbal admissions of respondent. In fact, the Government made no attempt to offer any evidence, except the defendant's extrajudicial admissions, to exclude any of the other sources of expendable assets in the hands of the defendant which would have justified the alleged increase in net worth. No evidence of lack of previous savings, lack of previous or immediate inheritances to himself or wife or lack of previous resources was presented. For a beginning to the net worth statement, the Government relied entirely upon the alleged admissions of the respondent.

On direct examination Agent Tucker testified that respondent told him he had $500.00 on hand on the last day of each year. But when the Agent pointed out that on January 4, 1950, respondent had deposited $1,971.50 in cash in a bank account, which must have come from receipts carried over from the end of the previous year, the Agent claimed respondent "informed" him that he had $500.00

"in cash on hand at the end of 1945, 1946, 1947, and 1948, and $1,971.50 at the end of 1949" (R. 59-60).

On cross-examination, respondent offered in evidence as Defendant's Exhibit A, the typewritten notes of Agent Tucker in which he made a memorandum of his conversation with respondent. This exhibit stated that respondent told Agent Tucker: "On January 1, 1944, he had approximately $500.00 in cash *in his pocket.* He believes that because it is his habit to carry that much money in his pocket at all times" (italics supplied) (R. 82). Agent Tucker also testified:

> "This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times. It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before" (R. 85).

The Government introduced in evidence as Exhibit 11, an affidavit of respondent, prepared by the agents. The agents did not include in this affidavit any reference to the alleged $500.00 cash on hand or in pocket at the end of each year. The only pertinent reference to cash on hand is the statement: "Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account" (R. 107-110).

Respondent testified he kept a safe in his home in which he kept a reserve of cash. He testified he had $16,000 to $17,000 at the end of 1945, and about $3,000 to $4,000 at the beginning of 1949 (R. 164-165). Verdugo told the agents that respondent carried plenty of cash in his safe, be-

cause of the nature of his business; he had to be making change, cashing checks and so forth, for his locations (R. 138). The agents never inquired how much money was in the safe (R. 85, 139).

The item of "cash on hand" was the principal issue in the case. At the inception of the trial respondent stipulated to all items on the net worth statement except "cash on hand" and "cash in bank" (R. 8-9). Throughout the trial, respondent objected to evidence offered on these items, and made appropriate motions to dismiss the indictment and to render a verdict for respondent, due to the failure of the Government to prove with reasonable accuracy the starting point of the net worth statement.

The Court of Appeals for the Ninth Circuit reversed the conviction (R. 220). The Court held that the burden of proof was on the Government as to each pertinent starting item of the net worth statement to a reasonable certainty. Since there was no independent proof of any portion of the corpus delicti, the extra-judicial written and oral statements of the defendant were not competent or admissible to establish the starting items of the net worth statements. The Court indicated that the admissions of the defendant as related by government agents were insufficient to establish the item of "cash on hand" anyway. Thus the prepared "Net Worth" statements had no valid probative value. There being no other evidence of any sort to establish "cash on hand" or to dispute the hypothesis in favor of innocent sources of present assets, there was no evidence to support the conviction (R. 219).

ARGUMENT

The Government contends the decision below (1) constitutes a substantial obstacle to the effective enforcement of the provisions of the internal revenue laws proscribing fraudulent tax evasion, and (2) is also inconsistent in principle with holdings in other circuits (Br. 7, 9).

(1) Contention That the Decision Below Is Inconsistent with Other Circuits.

Among cases cited as holdings by other circuits inconsistent in principle with the decision below, the Government included one from this same Ninth Circuit, *Remmer* v. *United States,* 205 F. 2d 277 (No. 304, 1953 Term, remanded for a hearing on other grounds, March 8, 1954). The Government's petition makes no mention of holdings of the Third, Fifth and Seventh Circuits which are in accord with the decision below, *Bryan* v. *United States,* 175 F. 2d 223 (C. A. 5), *United States* v. *Fenwick,* 177 F. 2d 488 (C. A. 7), and *United States* v. *Venuto,* 182 F. 2d 519 (C. A. 3). The court below cited the Bryan and Fenwick cases.

This contention that the decision below is inconsistent in principle with other decisions of the same Court demonstrates the weakness in the Government's position. The Ninth Circuit has had no difficulty in applying the principles involved. In *Spriggs* v. *United States,* 198 F. 2d 230 (C. A. 9) and the instant case it applied these principles in reversing convictions. In *Davena* v. *United States,* 198 F. 2d 230 (C. A. 9), *McFee* v. *United States,* 206 F. 2d 872 (C. A. 9), No. 414, 1953 Term, certiorari denied March

22, 1954, and *Remmer* v. *United States, supra,* it applied these principles in affirming convictions.

The Fifth Circuit applied these principles in reversing the conviction in the Bryan case, and affirming a conviction in *Sasser* v. *United States,* 208 F. 2d 535 (C. A. 5). The Seventh Circuit reversed in the Fenwick case, and affirmed convictions in *United States* v. *Chapman,* 168 F. 2d 997 (C. A. 7), certiorari denied 335 U. S. 853, *United States* v. *Hornstein,* 176 F. 2d 217 (C. A. 7), and *United States* v. *Yeoman-Henderson,* 193 F. 2d 867 (C. A. 7).

The decision below was not the result of applying a different or conflicting principle of law, but was due to a failure of proof by the Government. It is unnecessary to cite the many cases involving net worth where convictions have been upheld. The Courts of Appeals have had no difficulty in applying principles applicable to circumstantial evidence, and protecting defendants' rights in net worth cases. The Bryan, Fenwick, and Calderon cases appear to be the *only* ones where the evidence was based *solely* upon net worth computations unsupported by independent evidence of some portion of the crime. In those cases, the convictions were declared erroneous because of lack of evidence tested by ordinary rules of criminal procedure and evidence.

On the other hand, where reasonably cogent evidence from independent sources has been compiled and presented through earnest and thorough investigation, convictions based upon net worth have been upheld. In *United States* v. *Chapman, supra,* cited by the Court below, the court stated, p. 1001:

> "In a net worth case, the starting point must be based upon a solid foundation and a Revenue Agent's state-

> ment of the defendant's oral admission or confession when uncorroborated is not sufficient to convict."

The Seventh Circuit sustained that conviction based upon ample independent proof not found in the present case. The failure of the Government to produce competent independent proof against respondent after two trials, is a strong indication that evidence of guilt is lacking. As the court below stated in *Remmer* v. *United States, supra*, p. 280:

> "The fundamental question presented is what quantum of evidence must be offered by the Government before a trial court can properly submit the case to the jury. Whether sufficient evidence has been introduced in a given case will of course depend upon the facts of that particular case."

The conclusion is inescapable that the decision below is not in conflict in principle with decisions of the same, or other circuits. The court below applied well established and sound principles of criminal law in holding that under the facts of this case a conviction could not be sustained.

(2) Contention That the Instant Decision Is an Obstacle to Future Law Enforcement.

The decision below, far from constituting an obstacle to effective enforcement, is a healthy recognition, by the court, of the danger of violation of defendants' constitutional rights by the Government's unbridled use of the net worth method of computing net income. The Fifth Circuit recently made the following comment in *Demetree* v. *United States*, 207 F. 2d 892, 893 (C. A. 5):

> "This is another of the growing list of criminal cases in which the Government, having no or little direct

> evidence of the defendant's guilt to offer and endeavoring to prove it by circumstantial evidence, attempts to do so by what may be called a net worth and expenditures method of proof. In this attempt, unless the greatest care is taken by the District Judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendants income to take the place of proof of it."

In its Brief, the Government ingeniously assumes that a net worth computation somehow establishes unreported income although the beginning assets and liabilities on which it is based are not sustained by any proof, and are mere hypotheses of the Government accountant who set up the net worth statement. The Government theory seems to be that the mere posssesion of more *apparent* assets in 1949 than in 1946 establishes the difference in value of such visible assets as "income." From this false premise it then seeks to shift the burden of proof to the defendant to establish his innocence. In short, merely because a person has more visible, or more readily ascertainable assets in 1949 than he had in 1946, he can be successfully charged with income tax evasion if the difference in value of such property exceeds the amount on which he has previously paid income taxes.

From this same false premise the Government reasons that proof of the beginning assets (cash on hand) is not an essential element of the offense (Br. p. 7). This broad generalization fails to take into account the situation in which, as here, there is no outside evidence of the offense

at all, and the beginning assets of the net worth computation establish or refute the *fact* of one element of the crime itself.

In its petition the Government states "that the existence and amount of cash on hand are peculiarly within the knowledge of the defendant, and that *his failure* to present such evidence should not overcome an otherwise convincing showing of understatement of income" (Br. 9) (italics supplied). This insistence that the *exclusive* source of proof is the defendant's admissions is an admission that the Government contends a taxpayer should be forced to incriminate himself. However, in its attempt to find quick and easy means of completing investigations in tax cases, it overlooked the fact that prosecutors every day overcome similar obstacles in a variety of cases. There are many crimes in which the defendant's state of mind or knowledge is an essential element, such as perjury, knowledge of the counterfeit character of money, intent to defraud, and many others. The only source of accurate proof in these cases is the defendant's admissions, but Government agents always find enough "other" proof to establish this element beyond a reasonable doubt.

This is analogous to the situation in *Adams* v. *Maryland*, 22 L. W. 4150 No. 271 Oct. Term 1953, where this Court held a state court could not use testimony given by a defendant before a Congressional Committee to convict him. Justice Jackson stated the decision did not take anything from the state—but "she just has to work up her own evidence". Here the Court of Appeals simply told the Government it had to work up its own independent evidence of tax evasion before it could rely on a defendant's admissions.

The Government has lost sight of the distinction between civil and criminal tax cases. In civil tax cases, the determination of the Commissioner of Internal Revenue is prima facie evidence of a tax liability which the taxpayer must refute, but it is of no weight at all in a criminal case. *Helvering* v. *Mitchell*, 303 U. S. 391. Apparently what the Government is seeking is a special set of rules of criminal evidence and law to be applied to income tax prosecutions alone so that the administrative fiat of the Commissioner of Internal Revenue will be sufficient to require a given defendant to prove his innocence.

(3) Concerning the Proof of Corpus Delicti

In *Daeche* v. *United States*, 250 Fed. 566 (C. A. 2), Judge Learned Hand clearly put into unquestioned judicial language the rule requiring proof of the corpus delicti as a safeguard before permitting a defendant to be prosecuted and convicted on the basis of his own admissions or confessions. The proof of the corpus delicti, or the corroboration thereof, must touch such corpus delicti in the sense of the injury against whose occurrence the law is directed and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently such proof need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. The application of this corpus delicti rule has been, and remains, quite liberal. It is only where, as here, the Government attempts to convict a defendant solely by his own admissions that it is prevented from presenting such extra-judicial statements of the defendant. In the instant case, if respondent had

really been guilty, the Government would have had no difficulty in securing evidence, independently of respondent's admissions, which would have established some portion of the corpus delicti and thus made his admission competent proof.

Here the Government did not offer any evidence of "an otherwise convincing showing of understatement of income." It failed to prove essential elements of the offense. It did not offer in evidence the books and records of the respondent, nor claim that they were inadequate to clearly reflect his income, although such a finding is a prerequisite to use of the net worth method pursuant to Section 41 of the Internal Revenue Code. *Remmer* v. *United States, supra,* p. 286. It offered no direct evidence of *any income* received by respondent, and did not connect the alleged increase in net worth with any source of current income.

The basis of net worth computation prosecutions begins with elementary accounting principles. Without accurate starting entries, no accountant or bookkeeper would attempt to set up, or to maintain, an accurate set of books. Without such accurate starting items as, say Cash On Hand, the remainder of any accounting statement made for the purpose of establishing amounts of income, proves nothing. To prove these starting items of a net worth computation with reasonable accuracy is certainly no more difficult than to prove the fact of death and the manner of death in a murder prosecution. Yet, no one has ever suggested that the mere fact that a person died in the presence of a given defendant is sufficient to put such defendant on proof of his innocence of the crime of murder. Cases such as *Bell* v. *United States,* 185 F. 2d 302 (C. A. 4) certiorari denied, 340 U. S. 930, *Hornstein* v. *United States supra, Remmer* v. *United States,*

supra, and *Gariepy* v. *United States*, 189 F. 2d 459 (C. A. 6) all establish that there are many sources, and many means, available to a careful and diligent prosecutor which will furnish sufficient accurate information for the beginning of a net worth computation.

In *Spies* v. *United States*, 317 U. S. 492, 498-499, this Court held that to prove wilful evasion there must be some "affirmative action", some "element of evil motive, or concealment." Here there was no evidence except a bare increase in the value of visible tangible assets, with no independent proof of an essential element. The Court below correctly held that since there was no independent evidence of income tax evasion, the corpus delicti had not been shown, and therefore respondent's admissions could not be used in evidence. There was in fact, in the record, no evidence at all of Cash on Hand by respondent's admissions or otherwise. The only evidence offered was the oral statement of Agent Tucker, who included in the net worth statement only $500.00 cash on hand for 1946, 1947, and 1948, yet admitted on cross-examination that respondent had not told him he had $500.00 cash on hand on December 31, 1945, 1946, and 1947 (R. 80-87).

It has been said that "hard cases make bad law." The observation in *Demetree* v. *United States*, *supra*, p. 894 is pertinent:

> "This court and other courts have, in many cases, pointed out the dangers attending trials conducted in this way. Some of them have at times seemed to be more concerned with easing the difficulties attending the proof of guilt by this method than in preserving unimpaired the constitutional rights of a defendant, the fundamental safeguards and the guarantee of his liberty. Most of the courts, however, con-

fronted with the situation which this kind of case presents, have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials proceed, that the defendant is presumed innocent until his guilt is established by a legal and admissible evidence beyond a reasonable doubt."

CONCLUSION

The decision below is in all respects correct and there is no conflict of decision. It is, therefore, respectfully submitted that the petition should be denied.

Respectfully submitted,

NORMAN HERRING
1111 East Broadway
Tucson 11, Arizona
Counsel for Respondent

JOSEPH W. BURNS
30 Rockefeller Plaza
New York 20, New York
Of Counsel